

Supreme Court, U. S.

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IN THE  
**SUPREME COURT OF THE UNITED STATES**

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OCTOBER TERM, 1977

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No. 77-371

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REECE SHIRLEY and RON'S, INC., d/b/a  
BONNER SPRINGS IGA,  
Petitioners,

vs.

RETAIL STORE EMPLOYEES UNION AND ITS LOCAL 782,  
R.C.I.A., AFL-CIO, THEIR MEMBERS AND  
REPRESENTATIVES, ET AL.,  
Respondents.

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On Petition for a Writ of Certiorari to the  
Supreme Court of Kansas

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**BRIEF FOR RETAIL STORE EMPLOYEES UNION AND  
ITS LOCAL 782, R.C.I.A., AFL-CIO, THEIR MEMBERS  
AND REPRESENTATIVES, ET AL., IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the District Court of Wyandotte County,  
Kansas, and Journal Entry of Judgment are unreported (Pet.

App. pp. AI-AII). The opinion of the Supreme Court of Kansas is reported at 222 Kan. 373, 565 P.2d 585 (June 11, 1977), and is reprinted in Pet. App. pp. A-12-A-26.

### **JURISDICTION**

The decision of the Kansas Supreme Court was issued on June 11, 1977. The petition for a writ of certiorari was filed on September 8, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

### **COUNTER-STATEMENT OF THE QUESTION PRESENTED**

Whether state courts are pre-empted by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, from enjoining peaceful primary picketing.

### **STATUTES INVOLVED**

The relevant provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, are reprinted in Pet. App. pp. A-27. The Kansas Criminal Code, K.S.A. 21-3721, is reprinted in Pet. App. pp. A-27-28. K.S.A. 60-904(c), which restricts the right to injunctive relief is set forth as Appendix A of Respondent's brief on Page A-1.

### **STATEMENT OF THE CASE**

#### **A. The Trial Court's Findings of Fact.**

The essential facts as found by the trial court and relied upon by the Kansas Supreme Court are set forth in the trial court's Journal Entry of Judgment as follows:

1. This controversy involves picketing by the defendant union of a grocery store located in Bonner Springs Plaza, a privately owned shopping center in Bonner Springs, Kansas.

2. That plaintiff, Reece Shirley, is the owner of the shopping center and the building in which the store is located and which is leased to the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA store.

3. The defendant union has been certified by the National Labor Relations Board as the exclusive representative of the employees of the grocery store and that the union employees are on strike.

4. That the union has placed pickets in front of the grocery store; the picketing is peaceful.

5. The union has been notified by the plaintiffs by telegram to cease and desist from trespassing on plaintiff's property but has refused to stop its picketing.

6. The shopping center is located at the intersection of Front Street and Oak Street. It is bounded on the east side by Oak Street, on the south by Front Street, on the west side by Elm Street, and on the north side by a high wall and other business buildings.

7. There are only two stores located in the shopping center, the plaintiff's grocery and a Ben Franklin store, both of which are housed in one long building backed along Elm Street along the west side of the tract.

8. The stores face east and because of topography, are exposed to the public only from Front Street and Oak Street.

9. There are three entrances to the shopping center, one on the east side from Oak Street, one on the south from Front Street, and a third one at the southwest corner of the tract from Elm Street near the loading docks. Aside from these entrances,



the shopping center is separated from the adjoining streets by curbing and a narrow strip of land on the south side and a narrow public sidewalk running along Oak Street on the east.

10. Plaintiff's store occupies the south half of the building and has a loading dock on the south side of the store.

11. There is a walk covered by a canopy extending along the front of the stores which is six feet in width. Parking spaces are lined out for the stores' patrons in front of the store, and items which are for sale are displayed on the walk. Bumpers of cars parked in front sometimes overhang the walk so that in certain areas the passageway is restricted at times to approximately four and one-half feet.

12. Between the stores and the outside perimeters of the shopping center, the area is paved with asphalt and there are numerous parking spaces lined out. These areas provide common parking facilities for both stores in the shopping center.

13. The only entrance for patrons of the grocery store is on the east side of the store approximately in the middle of the store.

14. The distance from the front of the store across the parking area to the sidewalk along Oak Street is approximately 200 feet.

15. Oak Street is a principal thoroughfare in Bonner Springs and is rather heavily traveled. Parking is permitted along both sides of the sidewalk. Picketing engaged in by the defendant is on the walk in front of plaintiff's store, usually by two pickets wearing banner type jackets stating that the union was on strike against the plaintiff's store.

16. At times the pickets walk abreast causing congestion on the walk. On occasion some of the defendants eat their lunches on the curb at the south end of the building by the loading dock and pickets park their cars in front of the store in spaces reserved

for patrons. Evidence established one incident of horseplay. All of this causes annoyance and inconvenience to the patrons of the store. These incidents were sporadic and of short duration and relatively infrequent.

17. There was no evidence of any violence, threats, or harassment of patrons.

18. There was no showing the pickets have significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation.

19. Picketing by the defendant on the property of the plaintiff is controlled by *Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308. That case, as in this case, a privately owned shopping center is involved. The shopping center here, as in that case, was bounded by two rather heavily traveled streets and the only entrance to the shopping area was by way of five entrance ways from these streets. The shopping area was otherwise separated from the streets by earth and berms twelve to fifteen feet wide running alongside the street. The picketing was being carried out on the parcel pick-up area in front of the store by pickets carrying signs.

20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store.

21. . . .

22. Judgment is hereby entered against the plaintiffs and in favor of the defendants, denying the injunction.

### B. The Kansas Supreme Court's Decision.

The Kansas Supreme Court concluded “. . . a state court has the power to enjoin trespassory picketing only where there is shown to be *actual violence or a threat of immediate violence or some obstruction to the free use of the property* by the public which immediately threatens public health or safety or which denies to an employer or his customers reasonable ingress and egress to and from the employer's place of business.” The Court noted in the present case the trial court, after hearing the evidence found that all picketing was peaceful; there was no evidence of any violence, threats, or harassment of patrons; and there was no showing that the pickets had significantly interfered with the use to which the shopping center was being put by the plaintiffs and the general public, or with the store's operation. They held the trial court properly denied injunctive relief. (Emphasis added.)

### REASONS FOR DENYING THE WRIT

**1. The Subject Matter of This Controversy Has Been Pre-empted by the Congress of the United States and Assigned to the Exclusive Jurisdiction of the National Labor Relations Board Pursuant to the National Labor Relations Act, 29 U.S.C. § 141-187.**

We respectfully submit that this case is controlled by the recent Supreme Court case of *Hudgens v. N.L.R.B.*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976). That decision held that the rights of employees to peacefully picket during an economic strike is not guaranteed by the Constitution, but depends entirely upon the National Labor Relations Act. The Court then went on to state the National Labor Relations Board is the proper party to resolve these matters. The Court stated at 96 S.Ct. 1029, 1037:

“From what has been said it follows that the rights and liabilities of the parties are *dependent exclusively upon* the National Labor Relations Act. Under the Act the task of the Board, subject to review by the Courts, is to resolve conflicts between Section 7 rights and private property rights and to seek a proper accommodation between the two.” *Central Hardware Co. v. N.L.R.B.*, 407 U.S. 539, 543. (Emphasis added.)

Thus, we submit, the Supreme Court has clearly indicated the National Labor Relations Board, not the Courts, are to resolve these matters. This is in keeping with the Congressional intent of having a uniform labor policy throughout the United States by enacting the National Labor Relations Act. To hold otherwise would mean each state, county and city court in cases of this kind would have to function as a mini-National Labor Relations Board. Surely, a result not intended by the Congress of the United States. The National Labor Relations Board was,

and is, the centralized agency with the expert knowledge set up by Congress to create a uniform federal labor policy. Otherwise, picketing may be legal in one state, and illegal in another. Congress desired to avoid those diversities and conflicts that would result from local procedures and attitudes in labor controversies. *Garner v. Teamsters Union*, 346 U.S. 485 (1953). The Supreme Court clearly recognized this in *Hudgens, supra*, when it stated at 96 S.Ct. 1038:

"The locus of that accommodation, however, may fall at differing points along the spectrum depending upon the nature and strength of the respective §7 rights and private party rights in any given context. *In each generic situation the primary responsibility for making this accommodation must rest with the Board in the first instance.*" (Emphasis added.)

The Court went on to emphasize that the responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board.

The Court, in *Hudgens, supra*, then remanded the case to the National Labor Relations Board to consider the matter solely under the statutory criteria of the National Labor Relations Act. The Board re-affirmed its holding that the owner of a mall violated the Act by threatening to cause the arrest of employees of a store warehouse who were picketing a retail store located within the owner's enclosed shopping mall. The Board's decision, *Scott Hudgens and Local 315, Department Store Union R.W.D.S.U., AFL-CIO*, is reported at 230 N.L.R.B. No 73, 95 L.R.R.M. 1351 (June 23, 1977). The Board stated that to hold the picketing was not protected by Section 7 of the Act would enable employers to insulate themselves from Section 7 activities by simply moving their operations to leased locations on private malls and would thereby render Section 7 meaningless as to their employees.

We submit, that if state courts can interfere with peaceful primary picketing, the rights of employees to effectively strike will be destroyed. The employers will obtain restraining orders in cases of this type, and will use the courts to destroy the strike. The petitioner contends on page 11 of their brief that the injunction sought is narrowly aimed at enjoining the picketing on private property. The petitioner states the "issues of the labor dispute between the parties would not be effected by moving the sites of the union's protest from the private property to the public sidewalks . . ." Not so! Such removal by a state court may well cause a union to violate 29 U.S.C. § 158(b)(4) by involving other neutral employers in the dispute. In this very case the lower court found (paragraph 7 Journal Entry of Judgment) "There are only two stores located in the shopping center, the plaintiff's store and a Ben Franklin store, . . .". To remove the pickets to the outer limits of the shopping center will cause the Ben Franklin store, a neutral employer, to become involved in the dispute. Such removal may well cause the Union's picketing to be in violation of 29 U.S.C. § 158(b)(4), which states:

"(b) It shall be an unfair labor practice for a labor organization or its agents

(4)(b) forcing or requiring any person to cease using, selling, handling . . . or to cease doing business with any other person . . ."

If the Union is forced to the outer limits of shopping centers, it is possible every business in the shopping center will be involved in the dispute. The Court's order would force the Union to violate Section 8(b)(4) of the Act.

The employer here seeks an interpretation of the *Hudgens* decision that would give employers a license to bust strikes and unions. Such a decision will only encourage increased litiga-



tion, and cause employees who are denied the right to an effective strike to seek self help and risk jail or violence in order to obtain a labor contract with their employer. As the lower court found in its decision, Journal Entry of Judgment, paragraph 20:

"20. To compel the defendant union to conduct its picketing off the premises of the shopping center owned by plaintiff, Reece Shirley, and leased by the plaintiff, Ron's, Inc., d/b/a Bonner Springs IGA, under the circumstances here would for all practical purposes effectively hinder or bar the communication of ideas which the pickets seek to express to the patrons of the grocery store."

The Washington Superior Court, Benton County, in *Kadlec Hosp. v. Operating Engineers Local 280* reported at 91 L.R.R.M. 2703, March 11, 1976, refused an injunction in a state court suit for trespass. The Court, after reviewing the recent United States Supreme Court case on *Hudgens v. N.L.R.B.*, *supra*, concluded:

"A resumé of this decision is in order. We are to determine whether the defendant members, in the capacity of peaceful pickets are trespassing on plaintiff's property. The Supreme Court states they have no constitutional right to be there. The Court further states that if they have any legal right there, it is by virtue of the Taft-Hartley law, a Federal Statute and specifically § 7 of such act which goes to the very heart of labor organizations' existence. The initial interpretation of the acts of the parties with respect to the NLRA rests with the NLRB. Congress has so decreed. The Federal Courts have so ruled. The recent U.S. Supreme Court case has so ruled. In this situation this Court is prohibited from ruling on whether the pickets are trespassers. The proper forum is the NLRB. Therefore, this Court has no alternative but to dismiss the case."

We submit the above is a correct interpretation of the recent Supreme Court decision. The Courts have consistently held

that state statutes and jurisdiction must yield or "give way" where the conduct is even "arguably" subject to the National Labor Relations Act. See *Seapak, Division of W. R. Grace Corporation v. Industrial Technical and Professional Employees, etc.*, 300 F. Supp. 1197, 72 L.R.R.M. 2405 (1969); *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971).

Also, as was noted in the dissent in the *Hudgens* case, 92 S. Ct. at 1043, one of the issues was whether the employees could have picketed the public right-of-ways, where vehicles entered the shopping center. The dissent noted that apart from considerations of safety, that alternative was clearly inadequate. Prospective customers would have to read the sign while driving by in their vehicles—a difficult task indeed. Moreover, picketing at an entrance used by customers of all retail establishments may well invite undesirable secondary effects.

Finally, if the state is permitted to act, and grants an injunction and the injunction is later held to deny employees the right to picket under § 7 of the Act, then the employer will have used a state court to aid him in his strike. By the time the case is on appeal, the strike will long be over, as in this present case. Such a result should be rejected in the absence of a finding of violence or danger to public health or safety. *Sears Roebuck and Company v. San Diego County District Council of Carpenters*, 553 P.2d 603 (1976), Cert. granted 97 S.Ct. 1172.

It is admitted the state may protect against violence and protect the public welfare. The shopping center owner's right here is a "private" right of the property owner. In the present case, both the trial court and the Kansas Supreme Court found there was no violence, threat of violence or obstruction to the free use of the property involved. There is no substantial issue of public health or safety as would permit state action. Use of the state's trespass law to prevent peaceful primary picketing, which is regulated by the National Labor Relations Board would result in frustration of the uniform application of our federal labor laws.



## 2. The Cases Cited by Petitioner Are Distinguishable.

As the Supreme Court of Kansas in this case noted, in those cases where an injunction was granted, some of the cases involved situations where there was a threat of immediate violence or some actual obstruction to ingress and egress to and from the employer's place of business.

In *Taggart v. Weinacker's Inc.*, 214 So.2d 913 (1968), it was held that customers of the store were obstructed from entering or leaving the store. In the instant case, the Court specifically found the picketing was peaceful. Also, *Taggart, supra*, was decided before the recent Supreme Court case of *Hudgens, supra*.

In *People v. Goduto*, 174 N.E.2d 385 (1961), the defendants were non-employee union organizers. Here the pickets were employees of the store being picketed. The Court in *Goduto* held the defendants were guilty because they failed to have the Board determine the matter. The Court in *Goduto* did recognize (at page 386) that "... when an activity is protected by Section 7 or prohibited by Section 8 of the National Labor Relations Act the state must sustain from regulation." Again, *Goduto* was decided long before the recent Supreme Court case of *Hudgens, supra*.

The case of *May Department Stores v. Teamsters Local No. 743*, 355 N.E.2d 7 (1976), involved union organizers' solicitation of employees and distribution of literature on a company owned parking lot. In addition, the union's activity was in violation of a company non-solicitation rule in force at the store. The Union filed unfair labor practices with the National Labor Relations Board which were dismissed. It should be noted that the injunction in the May Department Store case was only aimed at organizational activity on company property. It was not aimed at peaceful primary picketing during an economic strike

by employees of the store involved. It cannot now be seriously contended the right to strike is not protected by 29 U.S.C. § 157. See *N.L.R.B. v. Tonkawa Refining Company*, 452 F.2d 900, 902 (C.A. 10, 1971); *N.L.R.B. v. Okla-Inn*, 488 F.2d 498, 502 (C.A. 10, 1974); and *Hudgens v. National Labor Relations Board, supra*.

## CONCLUSION

For all of the above reasons, it is respectfully urged that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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## APPENDIX

— A-1 —

### APPENDIX A

K.S.A. 60-904(c) *Restraint prohibited in certain cases.* No restraining order or injunction shall prohibit any person or persons, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means to do so; or from attending at or near a house or place where any person resides or works, or carries on business, or happens to be for the purpose of peacefully obtaining or communicating information, or of peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute; or from recommending, advising, or persuading others by peaceful means to do so; or from paying or giving to or withholding from any person engaged in such dispute any strike benefits or other moneys or things of value; or from peaceably assembling at any place in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto, or from any activity over which the federal authority is exercising exclusive jurisdiction. (L. 1963, ch. 303, 60-904; Jan. 1, 1964.)